Payremalu a/l Veerappan v Dr Amarjeet Kaur & Ors

HIGH COURT (TAIPING) — CIVIL APPEAL NO 12–23 OF 2000
VT SINGHAM JC
11 JULY 2001

Evidence *— Expert evidence — Medical opinion — Action by plaintiff against defendants for medical negligence — Whether necessary for plaintiff to adduce medical or expert evidence to support allegations of negligence against defendants*

Tort *— Negligence — Causation — Plaintiff lost eye following treatment at hospital for injury sustained to eye — Whether causative link between plaintiff's loss and action by first and second defendant established — Whether existence of any objective fact from which to deduce loss suffered by plaintiff indicated negligence on defendants' part*

Tort *— Negligence — Professional negligence — Medical negligence — Plaintiff lost eye following treatment at hospital for injury sustained to eye — Whether defendants negligent in treatment of plaintiff's injured eye — Whether defendants' failure to send plaintiff to another hospital negligent — Whether failure to warn plaintiff of risks of treatment carried out by first and second defendants negligent*

Tort *— Negligence — Res ipsa loquitor — Action by plaintiff against defendants for medical negligence — Res ipsa loquitor not pleaded in statement of claim nor raised at trial — Whether plaintiff entitled to raise doctrine on appeal*

The plaintiff had gone to the Hospital Taiping on 20 September 1993 after he was hit in his right eye by a foreign body or object while cutting the grass in his house compound. He was attended to by the first and second defendants, the consultant eye specialists at the hospital, and informed that he needed an operation to remove the said foreign body, and the facilities were only available at either Ipoh General Hospital or Kuala Lumpur General Hospital. The plaintiff decided to go to the latter by himself, but was warded at Hospital Taiping in the meantime. The first defendant informed the plaintiff that prior to referral to Kuala Lumpur General Hospital, the rupture in his eye had to be stitched and the procedure was performed on the plaintiff that same evening under general anaesthesia. The plaintiff suffered great continuous pain in his right eye after the operation and a second operation was carried out on his injured eye as a result of the pain, after which his condition further deteriorated. On 23 September 1993, the plaintiff's right eye was removed and he filed a civil action against the two eye specialists, the Director of Hospital Taiping and the Government of Malaysia (the first, second, third and fourth defendants, respectively), claiming damages for medical negligence. At the Sessions Court, Taiping, the plaintiff was the only witness and did not call any medical or expert evidence to support his claim. The defendants submitted no case to answer at the close of the plaintiff's case. The judge dismissed the plaintiff's claim and the plaintiff appealed. On appeal, the most important issue was whether the plaintiff had established any negligence against the defendants on a balance of probabilities that the first and second defendants had failed

to conform to that degree of skill required of them as eye specialists in the performance of the surgical treatment and, consequently, whether they were negligent.

Held, dismissing the appeal:

(1) On the facts of the case, the mere failure to send the plaintiff to the Ipoh General Hospital or Kuala Lumpur General Hospital was not negligence per se, as negligence did not lie in the omission to send the plaintiff to the hospital (see p 740D–E). In any event, there was no evidence to support the plaintiff's allegation that had he been sent to the Ipoh General Hospital or Kuala Lumpur General Hospital before the treatment at Hospital Taiping, his right eye could have been saved (see p 740G).

(2) There was a lack of evidence showing the causative link between the plaintiff's injury and the act of the first and second defendants. Although the court could draw an inference as to the causal link provided there was sufficient evidence or positive proved facts, in the instant case, there were no objective facts from which it could have been deduced, as a matter of reasonable deduction, that the loss of the plaintiff's right eye, on face value, had shown some negligence on the part of the first and second defendants (see p 741F–G). Taking into consideration the relevant principles of common law, the facts of the instant appeal and the evidence adduced on behalf of the plaintiff, the plaintiff had failed to prove on the balance of probabilities the causative link between the act of the first and second defendants and the injury to his right eye, which had been hit by a foreign body or object (see p 743F–G); *Dr Soo Fook Mun v Foo Fio Na & Anor and another appea*l [2001] 2 MLJ 193; *Dr KS Sivananthan v The Government of Malaysia & Anor* [2001] 1 MLJ 35 and *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871 followed.

(3) A mere failure to give a warning about the treatment which the first and second defendants had carried out on the plaintiff was not negligence per se (see p 743G–H); *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 5 MLJ 193 followed. However, in the instant appeal, sufficient warning of the risk had been given to the plaintiff by the defendants before the treatment was carried out. Nevertheless, even assuming that sufficient warning had not been given to the plaintiff about the risk of the treatment, it could still not have constituted negligence per se on the totality of the facts. In any event, the risk had to be of a real and foreseeable kind but not 'far-fetched or fanciful' (see p 744C–D); *Wyong Shire Council v Shirt* (1980) 146 CLR 40 followed.

(4) It was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the statement of claim against the defendants (see p 744E); *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [1998] 7 MLJ 48 followed.

The testimony of a medical expert would have been most material to the issue of causation but, unfortunately, the plaintiff had opted not to call such evidence. Counsel for the plaintiff had been misconceived in submitting that expert witness need not be called to prove medical negligence (see p 744H–I).

(5) It was not for the court to take notice or invoke the doctrine of res ipsa loquitor unless it was specifically pleaded or at least raised at the lower court by the plaintiff. Unless res ipsa loquitor was specifically pleaded and relied on by the plaintiff, the defendants would not have known that the onus had been thrown on them to give a reasonable explanation as to how and what had happened to the plaintiff's right eye. If the plaintiff intended to throw the evidential burden on the other side, ample notice had to be given to the defendants so that the defendants would be given the opportunity to negative the burden, if any. In this case, since the plaintiff or his counsel had not taken the initiative to address the sessions court judge on the issue of res ipsa loquitor, it was not the function of the appellate court to consider this issue in favour of the plaintiff (see pp 748F–G, I–749A).

(6) The plaintiff had failed to establish any negligence against the defendants as pleaded in the statement of claim and the defendants had rightfully exercised their option by submitting no case to answer. It is settled law that it is not for the defendants to disprove the allegations as contained under the particulars of negligence in the statement of claim, as the legal burden of proof still rests on the plaintiff (see p 749G); *Selvaduray v Chinniah* [1939] MLJ 253 and *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236 followed. In this case, the plaintiff had not satisfied the onus of proof placed upon him and that he had failed to establish that the first and second defendants had departed from the standard of care to be expected and required of a reasonably competent eye specialist (see p 749H–I); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 followed.

[**Bahasa Malaysia summary**

Plaintif telah pergi ke Hospital Taiping pada 20 September 1993 setelah beliau mata kanan beliau terkena satu benda atau objek asing semasa memotong rumput di kawasan rumah beliau. Beliau telah dirawat oleh defendan-defendan pertama dan kedua, pakar perunding mata di hospital tersebut, dan telah diberitahu bahawa beliau memerlukan satu pembedahan untuk membuang benda asing tersebut, dan peralatan-peralatan tersebut hanya terdapat sama ada di Hospital Besar Ipoh atau Hospital Besar Kuala Lumpur. Plaintif memutuskan untuk pergi ke Hospital Besar Kuala Lumpur sendiri, tetapi telah dimasukkan ke wad di Hospital Taiping buat sementara waktu. Defendan pertama telah memberitahu plaintif bahawa sebelum dirujuk ke Hospital Besar Kuala Lumpur, ruptur pada mata

beliau perlu dijahit dan prosedur tersebut telah dijalankan ke atas plaintif pada petang yang sama di bawah bius anestesia. Plaintif mengalami kesakitan berterusan yang amat pada mata kanan beliau selepas pembedahan tersebut dan berikutan itu keadaan beliau menjadi bertambah buruk. Pada 23 September 1993, mata kanan plaintif terpaksa dibuang dan beliau telah memfailkan satu tindakan sivil terhadap kedua-dua pakar mata tersebut, Pengarah Hospital Taiping dan Kerajaan Malaysia (masing-masingnya defendan-defendan pertama, kedua, ketiga dan keempat), dengan menuntut ganti rugi kerana kecuaian perubatan. Di Mahkamah Sesyen, Taiping, plaintif merupakan satu-satunya saksi dan tidak mengemukakan apa-apa keterangan perubatan atau pakar untuk menyokong tuntutan beliau. Defendan-defendan telah menghujahkan tiada kes untuk dijawab di akhir kes plaintif. Hakim telah menolak tuntutan plaintif dan plaintif telah membuat rayuan. Atas rayuan, persoalan yang paling penting adalah sama ada plaintif telah menunjukkan apa-apa kecuaian terhadap defendan-defendan atas imbangan kebarangkalian bahawa defendan-defendan pertama dan kedua telah gagal untuk mematuhi darjah kepakaran yang dikehendaki daripada mereka sebagai pakar-pakar mata di dalam menjalankan rawatan pembedahan dan, akibatnya, sama ada mereka telah cuai.

Diputuskan, menolak rayuan tersebut:

(1) Berdasarkan fakta-fakta kes, kegagalan semata-mata untuk menghantar plaintif ke Hospital Besar Ipoh atau Hospital Besar Kuala Lumpur bukan kecuaian per se, kerana kecuaian tidak terletak atas peningggalan untuk menghantar plaintif ke hospital tersebut (lihat ms 740D–E). Dalam apa keadaanpun, tidak terdapat keterangan untuk menyokong dakwaan plaintif bahawa jikalau beliau telah dihantarkan ke Hospital Besar Ipoh atau Hospital Besar Kuala Lumpur sebelum rawatan di Hospital Taiping, mata kanan beliau mungkin dapat diselamatkan (lihat ms 740G).

(2) Terdapat keterangan yang tidak mencukupi bagi menunjukkan kaitan penyebab antara kecederaan plaintif dan tindakan defendan-defendan pertama dan kedua. Walaupun mahkamah boleh tiba kepada satu inferen berhubung kaitan sebab akibat dengan syarat terdapat keterangan yang mencukupi atau fakta-fakta positif yang telah dibuktikan, dalam kes semasa tiada fakta objektif dari mana ia mungkin dapat disimpulkan sebagai satu perkara yang telah disimpulkan secara munasabah, bahawa kehilangan mata kanan plaintif, pada dasarnya, telah menunjukkan kecuaian di pihak defendan-defendan pertama dan kedua (lihat ms 741F–G). Setelah mengambilkira prinsip-prinsip *common law* yang relevan, fakta-fakta rayuan sekarang ini dan keterangan yang telah dikemukakan bagi pihak plaintif, plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian kaitan sebab akibat antara tindakan defendan-defendan pertama

dan kedua dan kecederaan pada mata kanan beliau, yang telah terkena benda atau objek asing (lihat ms 743F–G); *Dr Soo Fook Mun v Foo Fio Na & Anor and another appea*l [2001] 2 MLJ 193; *Dr KS Sivananthan v The Government of Malaysia & Anor* [2001] 1 MLJ 35 dan *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871 diikut.

(3) Kegagalan semata-mata untuk memberikan satu amaran tentang rawatan yang defendan-defendan pertama dan kedua telah jalankan ke atas plaintif bukan kecuaian per se (lihat ms 743G–H); *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 5 MLJ 193 diikut. Walau bagaimanapun, di dalam rayuan sekarang ini, amaran yang memadai tentang risiko tersebut telah diberikan kepada plaintif oleh defendan-defendan sebelum rawatan tersebut telah dijalankan. Meskipun begitu, walaupun dengan menganggap bahawa amaran yang memadai telah diberikan kepada plaintif tentang risiko rawatan tersebut, ia tidak mungkin membentuk kecuaian per se berdasarkan keseluruhan fakta-fakta. Di dalam apa keadaanpun, risiko tersebut mestilah jenis yang benar dan boleh diramal tetapi bukan 'tidak masuk akal atau merupakan khayalan' (lihat ms 744C–D); *Wyong Shire Council v Shirt* (1980) 146 CLR 40 diikut.

(4) Adalah penting bagi plantif untuk mengemukakan keterangan perubatan atau pakar untuk menyokong dakwaan-dakwaan yang terkandung di dalam pernyataan tuntutan terhadap defendan-defendan (lihat ms 744E); *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [1998] 7 MLJ 48 diikut. Keterangan seorang pakar perubatan adalah paling material terhadap persoalan sebab akibat tetapi, malangnya, plaintif telah memilih untuk tidak mengemukakan keterangan sedemikian. Peguam bagi pihak plaintif telah salah tanggap dalam menghujahkan bahawa saksi tidak perlu dipanggil untuk membuktikan kacuaian perubatan (lihat ms 744H–I).

(5) Bukan untuk mahkamah mengambil perhatian atau menggunakan doktrin res ipsa loquitor kecuali ia diplikan dengan khusus atau sekurang-kurangnya ditimbulkan di mahkamah bawahan oleh plaintif. Kecuali res ipsa loquitor diplikan dengan khusus dan plaintif bergantung kepadanya, defendan-defendan tidak mungkin mengetahui bahawa tanggungjawab tersebut telah dipindahkan ke atas mereka untuk memberikan satu penjelasan yang munasabah tentang bagaimana dan apa yang telah berlaku pada mata kanan plaintif. Sekiranya plaintif berniat untuk memindahkan beban keterangan ke pihak yang lain, notis yang sewajarnya patut diberikan kepada defendan-defendan agar defendan-defendan dapat diberikan peluang untuk menafikan beban tersebut, jika ada. Di dalam kes ini, memandangkan plaintif atau peguam beliau tidak mengambil usaha untuk mengutarakan kepada hakim mahkamah sesyen tentang persoalan res ipsa loquitor, ia bukan fungsi mahkamah rayuan untuk

mempertimbangkan persoalan ini untuk menyebelahi plaintif (lihat ms 748F–G, I–749A).

(6) Plaintif telah gagal untuk menunjukkan apa-apa kecuaian terhadap defendan-defendan sebagaimana yang telah diplikan di dalam pernyataan tuntutan dan defendan-defendan telah dengan betul menggunakan pilihan mereka dengan menghujahkan tiada kes untuk dijawab. Adalah undang-undang matan bahawa bukan untuk defendan-defendan untuk membuktikan sebaliknya dakwaan-dakwaan sebagaimana yang terkandung di bawah butiran-butiran kecuaian di dalam pernyataan tuntutan tersebut, kerana beban pembuktian di sisi undang-undang masih terletak ke atas plaintif (lihat ms 749G); *Selvaduray v Chinniah* [1939] MLJ 253 dan *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236 diikut. Di dalam kes ini, plaintif tidak berpuas hati dengan tanggungjawab pembuktian yang diletakkan ke atasnya dan bahawa beliau telah gagal untuk menunjukkkan yang defendan-defendan pertama dan kedua telah dilepaskan daripada piawai berjaga-jaga yang diharapkan dan dikehendaki daripada seorang pakar mata yang secara munasabahnya kompeten (lihat ms 749H–I); *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 diikut.]

Notes

For cases on medical opinion, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1337–1338.

For cases on causation, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 609–617.

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 798–849.

For cases on res ipsa loquitor, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 861–886.

Cases referred to

Abdul Kadir bin Mohamad v Kamarulzaman bin Zain & Anor [2001] AMR 599 (refd)

Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305 (refd)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (refd)

Barnett v Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068 (refd)

Cassidy v Ministry of Health [1951] 2 KB 343 (refd)

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (refd)

Chin Keow v Government of Malaysia & Anor [1967] 2 MLJ 45 (refd)

Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals [1998] 1 MLJ 57 (folld)

Dr KS Sivananthan v The Government of Malaysia & Anor [2001] 1 MLJ 35 (folld)

Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal [2001] 2 MLJ 193 (folld)
Eastern Enterprises Ltd v Ong Choo Kim [1969] 1 MLJ 236 (folld)
Elizabeth Choo v Government of Malaysia & Anor [1970] 2 MLJ 171 (refd)
Esso Petroleum Co Ltd & Anor v Southport Corporation [1955] 3 All ER 864 (refd)
Ghent and Ghent v Wilson [1956] OR 257, 2 DLR (2d) 160 (refd)
Hong Chuan Lay v Dr Eddie Soo Fook Mun [1998] 7 MLJ 48 (folld)
Hotson v East Berkshire Area Health Authority [1987] 2 All ER 909 (refd)
Hunter v Hanley [1955] SC 200 (Scot) (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86 (folld)
Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (folld)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Kamalam a/p Raman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor [1996] 4 MLJ 674
Kapur v Marshall et al 85 DLR (3d) (refd)
Laxman Balkrishna Joshi v Trimbak Bapu Godbole & Anor [1969] 1 SCR 206 (refd)
Liew Sin Kiong v Dr Sharon DM Paulraj [1996] 5 MLJ 193 (folld)
Low You Choy & yang lain v Chan Mun Kit & yang lain [1992] 3 CLJ 1550 (folld)
M Shoba v Dr Mrs Rajakumari Unnithan & Ors AIR 1999 Kerala 149 (refd)
Management Corp Strata Title No 1298 v Keller Piano Co (Pte) Ltd [1994] 2 SLR 78 (refd)
Mariam bte Mansor v JD Peter [1975] 1 MLJ 279 (folld)
Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276 (refd)
Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor [2000] 3 AMR 3445 (folld)
Multar v Lim Kim Chet & Anor [1982] 1 MLJ 18 (folld)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Ng Chun Pui & Ors v Lee Chuen Tat & Anor [1988] RTR 298; [1988] 2 HKLR 425 (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30 (folld)
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 (refd)
Rich v Pierpont (1862) 3 F & F 35; (1862) 176 ER 16 (refd)
Roe v Minister of Health & Anor [1954] 2 QB 66 (refd)
Selvaduray v Chinniah [1939] MLJ 253 (folld)
Sidaway v Governors of Bethlem Royal Hospital [1985] AC 88 (refd)
Swamy v Matthews & Anor [1968] 1 MLJ 138 (refd)
Tan Ah Kau v The Government of Malaysia [1997] 2 CLJ Supp 16 (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Bhd [1998] 1 MLJ 697 (folld)
Taw Too Sang lwn Chew Chin Sai & yang lain [2000] 5 CLJ 37 (folld)
Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50 (folld)
Tenaga National Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673 (refd)
Teoh Guat Looi v Ng Hong Guan [1998] 4 MLJ 525 (refd)
Toh Ming Jee v Lau Yiik Ung [1994] 3 CLJ 391 (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Velupillai v Government Of Malaysia & Anor [1970] 2 MLJ 63 (refd)
Whitehouse v Jordan & Anor [1981] 1 WLR 246 (refd)
Wilsher v Essex Area Health Authority [1988] 1 All ER 871 (folld)
Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor [1985] 2 MLJ 373 (folld)
Wong Yiu Ming v To Chark Wah & Anor [1993] 1 HKC 510 (refd)
Wyong Shire Council v Shirt (1980) 146 CLR 40 (folld)
Yeoh Cheng Han v Official Administrator, Malaya [1972] 2 MLJ 74 (folld)

Legislation referred to

Evidence Act 1950 ss 101, 102

Kerpal Singh (*U Harcharan & Kerpal*) for the appellant/plaintiff.
Megat (Federal Counsel, Perak State Legal Adviser's Office) for the respondents/defendants.

VT Singham JC:. This is an appeal against the decision of the sessions court judge in Taiping who had dismissed the plaintiff's claim on 26 July 2000 for damages against two consultant eye specialists at the Hospital Taiping. In this appeal, the appellant and the respondents will be referred to as the plaintiff and the defendants, respectively.

The first and second defendants, Dr Amarjeet Kaur and Dr Yap Chee Seng, were at all material times the consultant eye specialists at the Hospital Taiping. The third defendant, Dr Teh Lei Choo, was at all material times the director of the Hospital Taiping. The fourth defendant, being the government of Malaysia, was the employer of the first, second and third defendants.

A brief summary of the plaintiff's claim and evidence is as follows:

(1) on the afternoon of 20 September 1993, while the plaintiff was cutting the grass in his house compound using a grass cutter machine, he was hit in his (R) eye by some foreign body or object. He went to Hospital Taiping. At the eye clinic, he was examined by both Dr Amarjeet Kaur and Dr Yap Chee Seng, the first and second defendants respectively, and other medical officers. He was told by Dr Amarjeet Kaur that there was a foreign body in his (R) eye and he needed an operation to remove the said foreign body, and the facilities were only available at either Ipoh General Hospital or Kuala Lumpur General Hospital. The plaintiff chose to go to Kuala Lumpur General Hospital because he

had relatives in Kuala Lumpur and decided that he would go on his own, but in the meantime, he was admitted into the ward of Hospital Taiping;

(2) however, Dr Amarjeet Kaur, the first defendant, informed him that before he was referred to the General Hospital Kuala Lumpur, she had to stitch the ruptured part of his eye. The plaintiff was then admitted into the eye ward of Hospital Taiping on the same day, 20 September 1993. Dr Amarjeet Kaur carried out some treatment and, later in the evening, the plaintiff was taken into the operation room. In carrying out the operation under general anaesthesia, it is alleged that the first defendant negligently and unskillfully treated the plaintiff for his injured (R) eye. On recovering from the anaesthetic effect some time later, the plaintiff felt great pain in his (R) eye and continued to suffer great pain and suffering throughout the whole night;

(3) on the morning of the following day, 21 September 1993, the first defendant and the second defendant came for their morning ward rounds and removed the bandage on the treated (R) eye. After the removal of the bandage, the plaintiff could not see anything with his injured (R) eye and he continued to suffer severe pain the whole day. As a result of his pain, both the first and second defendants carried out a further operation on his (R) eye. After the second operation, his injured (R) eye became worse and his vision continued to deteriorate. On 23 September 1993, his (R) eye was removed and, as a result, the plaintiff lost his (R) eye.

The plaintiff then filed a civil action against the two eye specialists, the director of Hospital Taiping and the government of Malaysia (the first, second, third and fourth defendants, respectively) at the sessions court, Taiping, claiming damages for medical negligence.

At the sessions court, Taiping, the plaintiff was the only witness. The plaintiff did not call any medical or expert evidence to support his claim, although his counsel had informed the court after the plaintiff's evidence was completed on 27 January 2000 that he had a specialist as his witness. The case was then postponed to 4 May 2000 for continued hearing. Nevertheless, on 4 May 2000, the plaintiff closed his case without calling any medical or expert evidence to support his claim and no reason was advanced for not calling the expert as his witness.

On the other hand, the defendants contested the plaintiff's claim. The federal counsel who represented the defendants submitted no case to answer at the close of the plaintiff's case. Upon hearing submissions from both the plaintiff's counsel and the federal counsel for the defendants, the learned sessions court judge in Taiping dismissed the plaintiff's claim with costs. The plaintiff, who was dissatisfied with the decision, appealed to the High Court of Taiping against the dismissal of his claim. Hence, this appeal.

At the High Court, the plaintiff's learned counsel raised, inter alia, the following complaints and, in addition to the outline submissions encl 18, submitted as follows:

(1) the learned sessions court judge had misconstrued the facts and was influenced by irrelevant considerations; A

(2) there was no contradiction to the plaintiff's evidence but the sessions court judge relied on the medical report which was an agreed document;

(3) there was a prima facie case of negligence against the defendants as the plaintiff had entered the hospital to remove a foreign object in his (R) eye but had his eye removed by the defendants and, therefore, the defendants had to give an explanation; B

(4) the plaintiff was in no position to say what had taken place in the hospital and it was for the defendants to come to court and state that what was done was of the general expected standard; C

(5) the doctrine of res ipsa loquitor did not have to be pleaded in the statement of claim;

(6) at the first sign of complication, the plaintiff should have been sent to the Ipoh General Hospital which had the proper facilities, but the defendants had kept the plaintiff in Hospital Taiping on 22–23 September 1993; D

(7) the plaintiff ought to have been given a warning about the treatment that was to be given to him;

(8) as for quantum, the plaintiff's counsel proposed a sum of RM75,000. E

On the other hand, the learned federal counsel for the defendants raised the following matters:

(1) whether the plaintiff had established a prima facie case against the defendants;

(2) the issue of the defendants having to give a warning to the plaintiff about the treatment; F

(3) the doctrine of res ipsa loquitor was not pleaded by the plaintiff in the statement of claim and, therefore, it could not be invoked in favour of the plaintiff;

(4) whether the defendants were required to give an explanation based on the plaintiff's evidence in court. G

As to the above matters, the learned federal counsel, in addition to the outline submissions encl 25, submitted as follows:

(1) based on the facts and the evidence adduced by the plaintiff, there was no prima facie case of negligence established against the defendants and also the doctrine of res ipsa loquitor could not be invoked; H

(2) the damage that was caused to the plaintiff's (R) eye was caused by the plaintiff himself, which required surgical and emergency treatment;

(3) the defendants and the eye specialists had taken sufficient steps, care, management and treatment in accordance with the medical report which was tendered in support of the plaintiff's evidence. The plaintiff had failed to establish that the steps which were taken and in I

accordance with what is contained in the medical report was sub-standard;

(4) the damage to the plaintiff's (R) eye was caused by the plaintiff himself and the doctors merely treated him, and the defence relied on the '*Bolam* test';

(5) the plaintiff had failed to establish negligence against the defendants by his evidence and the medical report;

(6) by the plaintiff's evidence itself, he had shown that the defendants had taken adequate steps and that the plaintiff's damaged eye was serious;

(7) the defendants had taken necessary steps to prevent infection to the plaintiff's (L) eye;

(8) the loss of the plaintiff's eye was not due to any breach of duty by the eye specialists, but was due to a serious infection as a result of a foreign body which had entered in to his (R) eye;

(9) as to the issue of causation, the plaintiff had to prove his case on a balance of probabilities apart from a mere allegation of breach of duty by the defendants;

(10) the burden of proof was on the plaintiff to prove negligence against the defendants and the plaintiff had failed to discharge his duty to show that the injury to his (R) eye was due to the defendants' negligence;

(11) the plaintiff had intended to call an expert to show the standard medical practice, but failed to do so and instead relied on his own evidence;

(12) as to the warning to be given to the plaintiff on the risk involved, there was no serious risk involved, but it was an emergency case and a warning was in fact given that if he was not treated, it would affect the plaintiff's (L) eye and the defendants in fact also took steps to prevent infection or injury to the (L) eye;

(13) the plaintiff ought to have called a doctor to explain the injuries that were contained in the medical report, some of which were in medical terms which needed to be explained to the court;

(14) as to the defendants' obligation to give an explanation of the plaintiff's case, it depended on the evidence and the facts which were before the court. Based on the plaintiff's evidence and the medical report, the trial court was in a better position to evaluate the evidence as to whether the first and second defendants were negligent or whether the doctrine of res ipsa loquitor could be invoked. In his case, there was only the plaintiff's evidence and the medical report at p 53 of the record of appeal which the plaintiff had relied on to prove his case;

(15) that the plaintiff's appeal should be dismissed with costs.

In reply, the plaintiff's counsel submitted as follows:

(1) the plaintiff should have been sent to either Ipoh General Hospital or Kuala Lumpur General Hospital after the suturing was done to the plaintiff's (R) eye;

(2) on the issue of bacteria, the metal which entered into the plaintiff's (R) eye may have caused the infection and the metal should have been removed, but the question was, what was the source that caused the complication?

(3) the plaintiff had established a prima facie case of negligence against the defendants;

(4) the plaintiff's counsel did not call a medical expert at the trial because at that stage, he was not the counsel who was handling the matter as he was asked by another counsel to handle the case.

The plaintiff's learned counsel referred to the following cases in support of the plaintiff's case on liability:

(1) *Tan Ah Kau v The Government of Malaysia* [1997] 2 CLJ Supp 16

(2) *Swamy v Matthews & Anor* [1968] 1 MLJ 138

(3) *Elizabeth Choo v Government Of Malaysia & Anor* [1970] 2 MLJ 171

(4) *Chin Keow v Government of Malaysia & Anor* [1967] 2 MLJ 45

(5) *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 5 MLJ 193

(6) *Kamalam a/p Raman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor* [1996] 4 MLJ 674

(7) *Laxman Balkrishna Joshi v Trimbak Bapu Godbole & Anor* [1969] 1 SCR 206

(8) *M Shoba v Dr Mrs Rajakumari Unnithan & Ors* AIR 1999 Kerala 149

(9) *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [1998] 7 MLJ 48

(10) *Teoh Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525

(11) '*Medical Negligence in Malaysia*' by Dato' Dr Kamalanathan Ratnam [2000] 1 MLJ i

(12) *Cassidy v Ministry of Health* [1951] 2 KB 343

(13) *ROE v Minister of Health & Anor* [1954] 2 QB 66

(14) *Toh Ming Jee v Lau Yiik Ung* [1994] 3 CLJ 391

The learned federal counsel referred to and distinguished the following cases to oppose the plaintiff's appeal:

(1) *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118;

(2) *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*[1998] 1 MLJ 57

(3) *Nathan on Negligence* by Kamalanathan Ratnam J

(4) *Metroplex Development Sdn Bhd v Mohd Mastana Bin Makaddas & Anor* [1995] 2 MLJ 276

(5) *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4

(6) *Velupillai v Government Of Malaysia & Anor* [1970] 2 MLJ 63

(7) *Kapur v Marshall* et al 85 DLR (3d)

(8) *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068

(9) *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871

By the High Court

In this case, the most important issue is whether the plaintiff had established any negligence against the defendants on a balance of probabilities that the first and second defendants had failed to conform to that degree of skill required of them as eye specialists in the performance of the surgical treatment and, consequently, whether they were negligent.

Before proceeding with the professional obligations and duties of a doctor in administering medical treatment to patients, it is appropriate to refer to *Tan Ah Kau v The Government of Malaysia* [1997] 2 CLJ Supp 168 at p 171, wherein his Lordship Low Hop Bing J said:

> Civil litigations founded upon medical negligence are few and far apart in Malaysia. This may well be an excellent reflection of the high standard of skill and ability hitherto achieved and shown by the members of our medical profession who are always working assiduously and with full dedication and commitment, not only in strict compliance with the rules of medical etiquette and code of ethics, but also never failing to uphold and materialize their Hippocrates oath with pride. All their efforts aimed at enhancing the quality of all members of the medical profession must no doubt be a continuous exercise. The achievement or realization of this aim will most certainly augur well for the future. However, there are already some signs of weaknesses and shortcomings manifested in the exercise of reasonable skill or care, or the lack of it, which may slowly but surely lead to serious implications including civil liabilities founded on medical negligence. This case before me signifies and sets in its train, one of several cases, relating to medical negligence, which have been filed in our courts. It is no doubt the duty of the courts to conduct a full hearing, during which evidence will be unfolded, views ventilated, ideas analysed, submissions advanced and finally judgment delivered, in an otherwise rarified area of the law based on medical negligence. Cases such as this will eventually establish the principles of the rights and liabilities of doctors, their employers and patients, when medical treatment is administered and dispensed to them.

The duty of a doctor

As to the role and duties of doctors, in the treatment of their patients, it is relevant to consider the following cases. In *Roe v Minister of Health* [1954] 2 WLR 915 at p 926, his Lordship Denning LJ (as he then was) said:

> We should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

In *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at p 586, McNair J said:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

In another passage of the judgment, McNair J said at p 587 as follows:

> In a recent Scottish case, *Hunter v Hanley, Lord President Clyde* said: 'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.' If that statement of the true test is qualified by the words 'in all the circumstances,' Mr Fox-Andrews would not seek to say that that expression of opinion does not accord with the English law. It is just a question of expression. I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

In *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 881, Lord Scarman stated the *Bolam* principle in the following terms:

> The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even thought other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.

In *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*, his Lordship Abdul Malek Ahmad JCA (as his Lordship then was), presently judge of the Federal Court, referred to the following cases and summarised the views of those cases on liability against a doctor which is of assistance to this court to consider the issue of liability on the part of the defendants, which are as follows:

(1) in *Hunter v Hanley* [1955] SC 200 (Scot), it was held that to establish liability by a doctor where deviation from normal practice is alleged, three facts required to be established. First of all, it must be proved that there is a usual and normal practice; secondly, it must be proved that the defender has not adopted that practice; and thirdly, and this is of crucial importance, it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

(2) in *Rich v Pierpont* (1862) 3 F & F 35, the view was that a medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury was to judge. It was not enough to make the defendant liable that some medical men, of far greater

experience or ability, might have used a greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result.

(3) in *Whitehouse v Jordan & Anor* [1981] 1 WLR 246 at p 236, it was said that merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.

In *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171, Raja Azlan Shah J (as His Highness then was) said at p 172:

> The principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced.
>
> The standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients.

His Highness also referred to the true test that was expressed by Erle LCJ in *Rich v Pierpont* (1862) 176 ER 16 at pp 18–19 in the summing up of the case to the jury, which is as follows:

> It was an action charging him with a breach of his legal duty, by reason of inattention and negligence and want of proper care and skill; and if they were of opinion that there had been a culpable want of attention and care, he would be liable. A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result.

In *Swamy v Matthews & Anor* [1968] 1 MLJ 138, the Federal Court dismissed the appeal from the judgment of Ismail Khan J (as he then was) who had dismissed the plaintiff's claim for damages for negligence against a doctor, a visiting medical officer who was engaged to look after the health of the estate employees. His Lordship Barakbah LP said at p 139:

> Now on the law. A man or a woman who practices a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession — be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of *Lanphier v Phipos*, Tindal CJ laid down this principle:

> 'Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.
>
> Again in the case of *Hatcher v Black & Ors*, Denning LJ (as he then was) said that, in a hospital when a person was ill and came in for treatment, no matter what care was used there was always a risk; and it would be wrong and bad law to say that simply because a mishap occurred the hospital and doctors were liable. In deed, it would be disastrous to the community. It would mean that a doctor examining a patient or a surgeon operating at the table, instead of getting on with his work, would be for ever looking over his shoulders to see if someone was coming up with a dagger; for an action for negligence against a doctor was like unto a dagger, his professional reputation was as dear to him as his body — perhaps more so. And an action for negligence could wound his reputation as severely as a dagger could his body. The jury must therefore not find him negligent simply because on risks inherent in an operation actually took place, or because in a matter of opinion he made an error of judgment. They should find him guilty when he had fallen short of the standard of reasonable medical care, when he was deserving of censure.'

Having considered the cases aforesaid and the facts in the instant appeal, this court is of the view that mere failure to send the plaintiff to Ipoh General Hospital or Kuala Lumpur General Hospital as submitted by learned counsel for the plaintiff is not negligence per se as negligence does not lie in the omission to send the plaintiff to the hospital. On the contrary, there is evidence that the plaintiff himself chose to go to Kuala Lumpur but he never explained why he did not go to Kuala Lumpur General Hospital. The printed notes of the record of appeal states that the plaintiff was recalled by his counsel to give evidence at the next date of the continued hearing after he had previously closed his case. On this recall and during re-examination, the plaintiff refused to answer a specific question posed by his own counsel, namely 'adakah kamu memberi kebenaran untuk mata dicuci dan dijahit. Ingat baik-baik sebelum jawab' (see p 37 line 22–25 of the record of appeal). Why the plaintiff refused to answer this question has not been explained. In any event, there is no evidence to support the plaintiff's allegation that had he been sent to the Ipoh General Hospital or Kuala Lumpur General Hospital before the treatment at Hospital Taiping, the plaintiff's (R) eye could have been saved. In *M Shoba v Dr Mrs Rajakumari Unnithan & Ors* AIR 1999 Kerala 149, his Lordship S Krishnan Unni J said:

> A doctor is never presumed to be infallible. He is also not obliged to achieve triumph in every clinical case that he treats. *Doctor cannot be held negligent simply because something goes wrong. Doctor can be found guilty only if he falls short of standard of reasonable skiful medical practice*. The true test, therefore, to hold a medical practitioner guilty of negligence is to have a positive finding of such failure on his part as no doctor of ordinary skill would be guilty of acting with reasonable and ordinary care. (Emphasis added.)

Based on the facts in this case, the learned sessions court judge was correct when he found that 'the plaintiff had failed to prove that the first and second defendants had failed to exercise the ordinary skill of an eye specialists and that they were negligent in carrying out the treatment resulting in the plaintiff losing they eye'.

Causation

As to causation, it is relevant in cases of medical negligence to consider the causative link between the injury that was sustained by the plaintiff himself prior to seeking medical treatment and the act of the doctor in this case, the act of the first and second defendants, but, unfortunately, this evidence was lacking. This court is of the view that the allegations of negligence pleaded under the particulars of negligence as set out in the statement of claim must be established by the plaintiff on a balance of probabilities, unless there are positive proven facts from which the court could draw an inference of the causation. In *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909, the House of Lords, in allowing the appeal against the decision of the Court of Appeal which had affirmed the decision of the High Court, said (and which is summarised) as follows:

> … crucial question of fact which the judge had had to determine was whether the cause of the plaintiff's injury was his fall or the health authority's negligence in making an incorrect diagnosis and delaying treatment since if the fall had caused the injury the negligence of the authority was irrelevant in regard to the plaintiff's disability. That question was to be decided on a balance of probabilities. Accordingly, since the judge had held that on the balance of probabilities, given the plaintiff's condition when he first arrived at the hospital, even correct diagnosis and treatment would not have prevented the disability from occurring, it followed that the plaintiff had failed on the issue of causation …

On the other hand, the court could draw an inference as to the causal link provided there is sufficient evidence or positive proved facts at the trail when the first and second defendants attended to the plaintiff's injury. In the instant case, there were no objective facts from which it could be deduced, as a matter of reasonable deduction, that the loss of the plaintiff's (R) eye, on face value, had shown some negligence on the part of the first and second defendants. In a given situation when there is no direct evidence as to what happened which caused the plaintiff to loose his (R) eye and the plaintiff has to rely on inferences, this court is of the view that there must be objective facts to deduce from the other facts which it is sought to prove. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, Lord Wright said at p 169:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* [2001] 2 MLJ 193 at p 202, his Lordship Gopal Sri Ram JCA referred to the dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430 in reference to the burden of proving causation, which is of assistance to the correct determination in the instant appeal and which reads as follows:

> In the case like the present, the burden of proving causation remains throughout on the plaintiff. But there may be particular cases where an inference of causation may be readily drawn against a defendant warranting an explanation from him. In those circumstances, it may be entirely proper for the court to look to the defendant for a reasonable explanation negativing causation. This is not a rule of law but a mere rule of common sense. *McGhee v National Coal Board* [1972] 3 All ER 1008 illustrates the point.
>
> The pursuer failed before the Lord Ordinary and the First Division of the Court of Session on the ground that he had proved causation. On further appeal, the House of Lords reversed. Lord Wilberforce said (at p 1012):
>
> > 'But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the pursuer, on whom the onus lies, should fail — logic which dictated the judgments below. The question is whether we should be satisfied in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answers as a matter in policy or justice should be that it is the creator of the risk who, ex hypothesi, must be taken to have foreseen the possibility of damage, who should bear its consequences.'

Lord Bridge, after reviewing several authorities on the topic of causation said (at p 881):

> 'The conclusion I draw from these passage is that *McGhee v National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no

greater significance than that and the attempt to extract from it some esoteric principles which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.'

In *Dr KS Sivananthan v The Government of Malaysia & Anor* [2001] 1 MLJ 35, his Lordship PS Gill J referred to the law on causation as stated in *Jackson & Powell on Professional Negligence* (4th Ed) at p 719, which is also of assistance to the instant appeal and which is as follows:

> A plaintiff may claim that the defendant's negligent failure to give him proper treatment has deprived him of an improvement in his medical condition or has allowed him to deteriorate further. The 'but for' test of causation produces an 'all or nothing' result. Unless he can show that proper treatment was more likely than not to have produced an improvement or arrested the deterioration, the plaintiff will be unable to show that the defendant's negligence caused his damage and he will recover nothing. Thus, if the chance that proper treatment would have secured the desired result was less than 50%, the plaintiff cannot prove on a balance of probabilities that the damage would not have occurred in any event.

In *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871 at p 872, the headnotes read:

> Where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. *Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury*, although that link could legitimately be inferred from the evidence. (Emphasis added.)

In view of the reasoning in the abovementioned three cases and applying the principles referred to in those three cases in respect of the law on causation and to the facts in the instant appeal and taking into consideration the evidence adduced on behalf of the plaintiff, it is the view of this court that the plaintiff had failed to prove on the balance of probabilities the causative link between the act of the first and second defendants and his injury to the (R) eye, which had been hit by a foreign body or object.

Issue of risk which ought to be told to the plaintiff

As to the issue of the defendants having to give a warning to the plaintiff about the treatment by the defendants as raised by the plaintiff's counsel, this court is of the view that mere failure to give a warning about the treatment which the first and second defendants had carried out on the plaintiff was not negligence per se. In *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 5 MLJ 193 at p 205, his Lordship Ian Chin J said:

> *In the present case, what is beyond doubt is that the plaintiff required urgent treatment*, be it the Seton procedure or a second trabeculectomy, and it is thus imperative that the patient be convinced to undergo either of the treatment if his right eye was not to go blind. Given those circumstances it would not serve the interest of the plaintiff, especially when he had already shown reluctance

> to undergo the Seton procedure in Kuala Lumpur, to even hint that any surgery may make him blind which will certainly deter him from agreeing to any surgery and thus lose the only chance of preserving the deteriorating sight of his right eye. *It would be sad if doctors just for the purpose of preventing themselves from being sued would thrust to a patient every possible risk, however remote and which may arguably include death, associated with a surgery with the result that the patient would rather not undergo an operation. If a doctor felt that a patient needed an operation and that the benefit outweighs a remote risk and that in the doctor's opinion, based on his assessment of the patient's trait, the patient may be deterred if the remote risk is told to the patient, then the doctor should be allowed the therapeutic privilege of deciding whether or not to tell the patient the remote risk. No doctor should be liable on account of his decision not to tell the patient the remote risk which eventuated.* (Emphasis added.)

However, in the instant appeal, this court finds that sufficient warning of the risk had been given to the plaintiff by the defendants before the treatment was carried out. Nevertheless, even assuming that sufficient warning was not given to the plaintiff about the risk of the treatment, it could still not constitute negligence per se on the totality of the facts in the instant appeal. In any event, the risk must be of that kind if it is real and foreseeable, but not if it is 'far-fetched or fanciful' (see *Wyong Shire Council v Shirt* (1980) 146 CLR 40, per Mason J at p 47). Nevertheless, the onus of proof is still 'the *Bolam* test'.

Medical evidence to support the plaintiff's case

As to the issue raised by the learned federal counsel that the plaintiff did not call any medical evidence to support his case, this court is of the view that it was important for the plaintiff to have adduced medical or expert evidence to support the allegations contained in the statement of claim against the defendants and this could have also assisted the court or thrown some light in arriving at its decision, but, unfortunately, there was no such evidence before the trial court.

In *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [1998] 7 MLJ 481, his Lordship James Foong J in dismissing the plaintiff's claim, inter alia, said at p 502:

> … no medical evidence was called upon to argue that what was informed and advised by the defendant to the plaintiff was inadequate and insufficient. Deprived of this, I can only rely on what was presented, and consider it in the light of all other evidence adduced. My conclusion is that what was informed and advised by the defendant to the plaintiff on the risk factor is comprehensive, adequate and sufficient.

In the instant appeal, this court is of the view that the testimony of a medical expert would have been most material to the issue of causation but, unfortunately, the plaintiff opted not to call such evidence. Nevertheless, it is important to correct the misconception by the learned counsel for the plaintiff wherein it was submitted in the lower court in reference to an article on 'Medical Negligence in Malaysia' by His Lordship Dato' Kamalanathan Ratnam J [2000] 1 MLJ i, wherein it was submitted to the effect that expert witness need not be called to prove medical negligence. It

A is the respectful view of this court that his Lordship did not say that expert witness was not required to establish medical negligence against a doctor as submitted by the learned counsel for the plaintiff who had relied on the article. His Lordship Kamalanathan Ratnam J merely stated that it is difficult to obtain the services of doctors who are willing to testify against his colleague or against another doctor and nothing more or nothing less was said to the effect that no medical evidence was required to establish medical negligence as contended by the plaintiff's learned counsel.

Res ipsa loquitor

C On the issue that res ipsa loquitor has to be pleaded, there appears to be two schools of thought, one, which states that res ipsa loquitor need not be pleaded and the other, which states that it has to be pleaded if the plaintiff wishes to rely on res ipsa loquitor.

In this appeal, it cannot be denied that the plaintiff did not plead res ipsa loquitor in the statement of claim. Further, he did not even rely on res D ipsa loquitor during the trial. The plaintiff's counsel with respect did not even raise or submit in the alternative at the lower court that if the court finds that the plaintiff had failed to establish negligence through direct evidence against the defendants, the plaintiff could fall back on the doctrine of res ipsa loquitor despite the fact that the learned federal counsel had submitted in the lower court that the plaintiff did not plead res ipsa loquitor. E The plaintiff's counsel in his reply in the lower court did not even respond to the submissions of the federal counsel. In the circumstances, it is clear from the printed notes contained in the record of appeal that the plaintiff was not relying on res ipsa loquitor throughout the trial at the lower court and even at the submissions stage.

F However, on appeal, the plaintiff's learned counsel submitted that the plaintiff need not plead res ipsa loquitor and referred to the following cases:

(1) *Liew Sin Kiong v Dr Sharon DM Paulraj* [1996] 5 MLJ 193

(2) *Teoh Guat Looi v Ng Hong Guan* [1998] 4 MLJ 525

G On the other hand, the learned federal counsel had not only raised this issue at the lower court of the plaintiff having not pleaded res ipsa loquitor in the statement of claim, to which there was no response from the plaintiff's counsel, but this issue was still kept alive, raised and canvassed on appeal by the learned federal counsel that the plaintiff cannot be allowed to rely on res ipsa loquitor to establish the plaintiff's claim as it was not pleaded.

H This court is of the view that the issue as to whether res ipsa loquitor has to be pleaded in the statement of claim by the plaintiff in order for the plaintiff to rely on will depend on the facts and circumstances of each case. In this case, it cannot be denied that the plaintiff did not rely on the doctrine of res ipsa loquitor in the lower court to establish his case against the I defendants.

However, as a desperate attempt and, with respect, the plaintiff's learned counsel in a roundabout turn on appeal submitted that the plaintiff

could rely on res ipsa loquitor even though it was not pleaded which, no doubt in the view of this court, to borrow the expression applied by his Lordship Mohtar Abdullah FCJ in *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305, 'smacks of an afterthought.' The plaintiff perhaps was so confident that he had established negligence against the defendants based on the particulars of negligence as pleaded in the statement of claim that he chose not to rely on res ipsa loquitor at the lower court and did not even bother to response to the submissions of the learned federal counsel for the defendants or to apply to amend the statement of claim to include res ipsa loquitor at the lower court or even on appeal. It does not matter as to whether the plaintiff will succeed or not on his application to include res ipsa loquitor by an amendment on appeal, but the fact remains that he could have at least as a safe measure made an attempt and applied to amend the statement of claim to include res ipsa loquitor but this was not done because the plaintiff's counsel was of the view that res ipsa loquitor need not be pleaded in order for the plaintiff to rely on it. This court finds that in order to invoke res ipsa loquitor for the plaintiff's case, which was canvassed on appeal by the learned counsel for the plaintiff and not even raised in the Memorandum of Appeal, but nevertheless it would appear that as a 'last ditch attempt to salvage the case' for the plaintiff, the learned counsel for the plaintiff argued that res ipsa loquitor could be considered in favour of the plaintiff. In *Elizabeth Choo*'s case, Raja Azlan J (as his Lordship then was) and presently His Highness said on the facts in that case:

> In my judgment the doctrine could not be invoked by the plaintiff. There could be no presumption of negligence arising from the mere circumstance that the anaesthetist failed to avoid perforation because that might have been caused by causes beyond his control. Liability must depend on the plaintiff establishing that there had been a want of competent care and skill.

In *Management Corp Strata Title No 1298 v Keller Piano Co (Pte) Ltd* [1994] 2 SLR 78, his Lordship Lim Teong Qwee JC referred to the Privy Council case in *Ng Chun Pui & Ors v Lee Chuen Tat & Anor* [1988] RTR 298, wherein Lord Griffiths said at p 301 as follows:

> … it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. *In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants*. (Emphasis added.)

On the other hand, even assuming that the plaintiff need not plead res ipsa loquitor in order to invoke the doctrine, the fact still remains that the plaintiff did not rely or canvass on this doctrine at the lower court. In fact, there is nothing on record to indicate that counsel for the plaintiff had addressed the learned sessions court judge on the doctrine of res ipsa loquitor. In the circumstances, the plaintiff cannot try his luck by attempting to raise the doctrine on appeal because the learned sessions court judge was not given an opportunity to direct his mind or to give his decision on this issue.

A However, on the facts in this case, it is still for the plaintiff to prove that the act of the two eye specialists had caused him to loose his (R) eye, as the burden of proof still remains upon the plaintiff to prove that his loss of (R) eye was caused by the negligence of the two eye specialists and there was a causal link (see s 101 of the Evidence Act 1950, *Tenaga National Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 at pp 676–677, *Nanyang* B *Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145). It is the view of this court that there could be no presumption of negligence arising from the mere failure to send the plaintiff to Ipoh General Hospital or Kuala Lumpur General Hospital as contended by the learned counsel for the plaintiff as each case must be decided in accordance with its particular facts and circumstances. In *Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor* C [1985] 2 MLJ 373 at p 375, his Lordship Lee Hun Hoe CJ (Borneo) said:

> *Res ipsa loquitor* does not mean that merely because a person is assaulted by a group of ruffians and hurt this implies negligence on the part of the doctor who, in an emergency, examined and treated him. If that is the law then a stage would be reached when no doctor would care to render any assistance D to a victim of an accident or assault.

In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, his Lordship Sharma J (as His Lordship then was) said at p 196:

> It should be realized that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. E No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. *In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed* F *by one party and denied by the other. The court is not entitle to decide a suit on a matter on which no issue had been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point*. In disposing of a suit or matter involving a disputed question of fact *it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made* G *out in its own pleading. The trial of a suit should be confined to the pleas on which the parties are at variance*. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ. (Emphasis added.)

H It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v Pollard & Morris*:

> '*Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment*. In the present case I the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.' (Emphasis added.)

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v Sakiman* where Sir Charles Mathew CJ said: A

> '*I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.*' (Emphasis added.)

In *Kapur v Marshall et al* 85 DLR (3d), his Lordship Robins J of the Ontario High Court said: B

> The evidence compelled the conclusion that the plaintiff had not satisfied the onus of establishing that the defendant departed from the standard of care to be expected and required of a reasonably competent surgeon. The particular risk of the operation was recognized by the defendant and the evidence did not indicate that he failed to take whatever precautions it was possible for a surgeon to take to avoid that risk. That the accident happened in this case; when it so rarely does happen, did not compel a finding of negligence. *An unfavourable result is not synonymous with negligence. A surgeon is not an insurer. He undertakes only to provide the standard of skill and care possessed generally by others practising in his field in similar circumstances*. (Emphasis added.) C

In *Wong Yiu Ming v To Chark Wah & Anor* [1993] 1 HKC 510 at p 515, his Lordship Downey DJ allowed the plaintiff to amend his pleadings at the trial to rely on the doctrine of res ipsa loquitor but went on to say that: D

> It is not necessary to specifically plead the doctrine, but it is usual and, in my view, good practice to do so. Contrary to Mr Sham's submission, the doctrine does not shift the burden of proof to the defendants, see *Ng Chun Pui & Ors v Lee Chuen Tat & Anor* [1988] 2 HKLR 425. But, in my view, *it should be pleaded so that the defendants are put on notice that the court may expect some explanation from the defendants or other evidence explaining the cause of the occurrence*. (Emphasis added.) E

In view of the aforesaid matters, it is the view of this court that the doctrine of res ipsa loquitor could not be invoked by the plaintiff (see *Jaafar bin Shaari & Anor (Suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 707). F

This court is of the view that it is no part of the court to take notice or invoke the doctrine of res ipsa loquitor unless it is specifically pleaded or at least raised at the lower court by the plaintiff. Unless res ipsa loquitor is specifically pleaded and relied on by the plaintiff, how will the defendants know that the onus is thrown on them to give a reasonable explanation as to how and what happened to the plaintiff's (R) eye. It is also no part of the court to fill the gap in the evidence because it is still the duty of the plaintiff to establish negligence against the defendants which, based on the evidence adduced, he had failed to discharge his duty against the defendants. Malaysian courts adhere to the common law adversarial system of procedure as distinct from the inquisitorial system used in the civil law jurisdiction. Under an adversarial system, the judge merely presides at the hearing and takes a passive role in the presentation of the evidence. He is a passive umpire of the facts as presented by him (see *Halsbury's Law of Malaysia* Vol 1 (10.1–004)). It is the view of this court that if the plaintiff intends to throw the evidential burden on the other side, ample notice must be given to the defendants so that the defendants will be given the G H I

opportunity to negative the burden, if any. In this case, since the plaintiff or his counsel himself did not take the initiative to address the learned sessions court judge on the issue of res ipsa loquitor, it is not the function of this court sitting on appeal to consider this issue in favour of the plaintiff for reasons stated hereinbefore.

No case to answer

As to the practice of no case to answer, this court is of the view that the defendants have the option to call no evidence for the defendants and submit no case to answer if the plaintiff's evidence at its face value has not established any negligence against the defendants (see *Tan Kim Khuan v Tan Kee Kiat (M) Bhd* [1998] 1 MLJ 697 at p 706, *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236 at p 244). In *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4, his Lordship Sinnathuray J said as summarised in the headnotes:

> In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.
>
> It would be a desirable practice in our courts to allow a submission of no case to answer at the end of the plaintiff's case, without putting the defendant to his election, whether to call evidence or not, if his submission fails, such a practice will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the hearing.

It is the view of this court that the defendants cannot be found responsible merely because they did not negative some possible causes which has never been pleaded, raised or relied on by the plaintiff in the course of the trial. In *Esso Petroleum Co Ltd & Anor v Southport Corporation* [1955] 3 All ER 864, Lord Normand said at pp 868–869:

> The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In this case, since the plaintiff had failed to establish any negligence against the defendants as pleaded in the statement of claim, this court is of the view that the defendants have rightfully exercised their option by submitting no case to answer. It is settled law that it is not for the defendants to disprove the allegations as contained under the particulars of negligence in the statement of claim as the legal burden of proof still rests on the plaintiff (see *Selvaduray v Chinniah* [1939] MLJ 253 at p 254, *Eastern Enterprises Ltd v Ong Choo Kim*).

This court is of the view that the plaintiff has not satisfied the onus of proof placed upon him and that he has failed to establish that the first and second defendants had departed from the standard of care to be expected and required of a reasonably competent eye specialist (see s 102 of the Evidence Act 1950, *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 at p 89). In *Kapur*'s case, *Ghent and Ghent v Wilson* [1956] OR 257,

2 DLR (2d) 160, was referred to, wherein his Lordship Schroeder observed at p 265-266, p 165-166 as follows:

> Each case must, of course, depend upon its own particular facts. If a physician has rendered treatment in a manner which is in conformity with the standard and recognized practice followed by the members of his profession, unless that practice is demonstrably unsafe or dangerous, that fact affords cogent evidence that he has exercised that reasonable degree of care and skill which may be required of him. It has not been made to appear that the defendant physician departed in this instance from what has been established to be the standard and recognized practice of physicians in this province. The plaintiffs have failed to satisfy the burden of proving any negligent act default on the part of the defendant …

Function of the appellate court

In *Dr Soo Fook Mun v Foo Fio Na & Anor and another appeal* at p 202, his Lordship Gopal Sri Ram JCA referred to the following passage in the dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430, which reads as follows:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

In the circumstances, this court is of the view that the learned sessions court judge had not erred in law or on the facts for the reasons stated above as there was insufficient evidence upon which the learned sessions court judge could find that there was negligence on the part of the defendants and for the following reasons:

(1) there was no evidence or otherwise that what was done by both Dr Amarjeet Kaur and Dr Yap Chee Seng was not a fair and reasonable standard of care and skill expected of an ordinary medical doctor;

(2) the plaintiff had not established what the usual and normal practice was for both eye specialists to have acted on when the plaintiff was referred to them for treatment;

(3) the plaintiff did not establish the required competent care and skill which was expected of both the eye specialists;

(4) the plaintiff did not produce any medical opinion to prove that what was carried out by both eye specialists was contrary to the required care and skill expected of a medical doctor attending to the plaintiff's condition and injury to the eye;

(5) even assuming that there was an error of judgment on the part of both the first and second defendants, which on the facts it was not established, the first and second defendants could still not be found negligent as on the facts in this case, there was nothing established by the plaintiff to show that they did not act as expected of reasonably competent medical doctors when they attended to the plaintiff to treat his injured (R) eye;

(6) the plaintiff did not even plead in the alternative in his statement of claim the doctrine of res ipsa loquitor or placed any reliance on it and did not even address the sessions court judge on the doctrine of res ipsa loquitor and this court could give its decision only in accordance with the pleadings, evidence and the application of the law and nothing short of this will suffice;

(7) there was no reasonable explanation given on behalf of the plaintiff as to why the plaintiff, who had intended to call specialist or expert evidence to support his case, did not do so. All that the plaintiff's learned counsel said from the bar table on appeal was that he was not the counsel who was handling the matter in the lower court as he was asked by another counsel to handle the case, which was certainly not a good reason because the onus of proof to establish negligence was still on the plaintiff;

(8) the plaintiff had failed to establish any negligence against both the eye specialists apart from his bare allegations and, accordingly, the learned sessions court judge was correct when he dismissed the plaintiff's claim.

It is unfortunate that the plaintiff is not able to succeed in obtaining damages against the hospital authorities, but the decision of this court can only be given according to the printed evidence in the record of appeal and in accordance with the law, and nothing short of the scope of these two requirements will suffice, although the sympathy of this court is for the plaintiff. However, doctors should not be held liable or threatened with a suit for damages for every instance of mishap or for every medical judgment in the hospital which occurs in the course of treating patients. Indeed, doctors cannot be expected to carry out their professional duty with care if they have to do it under fear of being sued by their patients.

General damages

As to general damages, this court is unable to appreciate why the learned sessions court judge did not asses or quantify damages for the loss of the plaintiff's (R) eye despite repeated reminders by our superior courts that assessment should be made even if the decision was against the plaintiff-claimant (see *Yeoh Cheng Han v Official Administrator, Malaya* [1972] 2 MLJ 7 at p 10, *Multar v Lim Kim Chet & Anor* [1982] 1 MLJ 184, *Wong Choon Mei & Anor v Dr Kuldeep Singh & Anor* at p 376 and the High Court decision in *Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor* [2000] 3 AMR 3445).

Based on *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*, *Low You Choy & yang lain v Chan Mun Kit & yang lain* [1992] 3 CLJ 1550 and *Taw Too Sang lwn Chew Chin Sai & yang lain* [2000] 5 CLJ 37, this court is of the view that a sum of RM50,000 is reasonable as general damages for the loss of the plaintiff's (R) eye, although the award in the cases referred to was for loss of sight of the eye. This court is of the respectful view that the award of RM70,000 for the loss of sight to the (R) eye and confirmed by the High Court in *Abdul Kadir B Mohamad v Kamarulzaman bin Zain & Anor* [2001] AMR 599 and a sum of RM75,000 in *Toh Ming Jee v Lau Yiik Ung* with respect are on the high side and not in accordance with the trend of awards (see *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30, *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50, *Mariam bte Mansor v JD Peter* [1975] 1 MLJ 279). This court is mindful that 'without sight, it would be a dark world to live in', as highlighted by his Lordship Abdul Malek Ishak J in *Abdul Kadir bin Mohamad*'s case, but at the same time, it cannot be overlooked that there must be a 'ceiling' to the award for similar injuries, otherwise there will be uncertainty in the lower courts and no proper guidance to follow when awarding damages for personel injuries claims. As a result, this will lead to unnecessary appeals and add to the costs. In fact, there have been instances of disparity of awards by a sessions court for total loss of vision of an eye. In one case, the sessions court awarded RM50,000 for total loss of vision of an eye, in another case it awarded a sum of RM75,000 for similar injury, in the third case, it awarded a sum of RM25,000 for 75% loss of vision and in the instant case, no award was made for the loss of the (R) eye by the same court. In all these cases, the plaintiff was represented by different counsels and the period during which the awards were made was within eight months.

However, in order to keep in line or conformity with the recent decision of the Court of Appeal in *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*, this court is of the view that if the plaintiff had succeeded in this claim, an award of RM50,000 towards general damages is reasonable. The sum of RM35,000 as proposed by the learned federal counsel is certainly on the low side and not in accordance with the trend of awards. In fact, *Toh Ming Jee v Lau Yiik Ung* is not an unreported case as referred in *Abdul Kadir B Mohamad* because it is reported and the citation is [1994] 3 CLJ 391.

In the circumstances and having considered the submissions of both the learned counsel for the plaintiff and the learned federal counsel for the defendants, and after having re-read the record of appeal together with the memorandum of appeal and the list of authorities referred to by both parties to this court, which contains voluminous pages, this court is unable to interfere with the decision of the learned sessions court judge. Accordingly, the appeal is dismissed with costs, with the usual order for the deposit to be paid to the respondents towards account of costs.

Appeal dismissed.

Reported by Anita Teo